BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TRISH LAWLESS	)	
Claimant	)	
VS.	)	
	)	Docket No. 214,874
EMERSON ELECTRIC COMPANY	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant appeals from an Award entered by Administrative Law Judge John D. Clark on May 22, 1998. The Appeals Board heard oral argument January 8, 1999.

APPEARANCES

Joseph Seiwert of Wichita, Kansas, appeared on behalf of claimant. Edward D. Heath, Jr., of Wichita, Kansas, appeared on behalf of respondent, a qualified self-insured.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant seeks modification of an Agreed Award entered in this case on February 18, 1997. Claimant contends she is entitled to modify the nature and extent of disability in that Agreed Award from functional impairment to work disability because her wage has now dropped to less than 90 percent of her preinjury wage. The provisions of K.S.A. 44-510e, therefore, no longer limit the award to functional impairment. The ALJ denied the request for two reasons: (1) he found the wage was not less than 90 percent of the preinjury wage; and, (2) he concluded work disability is not available where, as here, the claimant returns, without accommodation, to the same job after the injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds and concludes the Award should be affirmed.

Claimant suffered compensable bilateral carpal tunnel syndrome with August 21, 1995, as the stipulated date of accident. On February 18, 1997, the parties entered an Agreed Award for a 7 percent permanent partial general disability based on an average weekly wage of $493.77. In October 1995, claimant returned to work. She had undergone surgery on both upper extremities, but the treating physician returned her to the same work without restrictions. She was able to do the same job duties but did them more slowly and had discomfort doing them.

On March 14, 1997, claimant filed the present application for review and modification under K.S.A. 44-528. Claimant seeks to modify the agreed award for disability based on functional impairment to an award based on work disability. K.S.A. 44-510e limits a claimant to disability based on functional impairment so long as the claimant earns a wage which is equal to 90 percent or more of the preinjury average weekly wage. Claimant contends that she now earns less than 90 percent, has work restrictions, and is entitled to a work disability. The ALJ denied the modification for two reasons. First, he found claimant's wage is not less than 90 percent of her preinjury wage. Second, he concluded that she would not be entitled to work disability because after the injury she returned to, and was able to perform, the same job she was doing at the time of the injury.

The Board disagrees with the ALJ's conclusion that claimant's average weekly wage is more than 90 percent of the preinjury wage. At the time of the injury, claimant's average weekly wage was $493.77. The ALJ calculated the post-injury wage by using the pay claimant received for weeks ending January 9, 1998, through March 20, 1998, the latest 11 weeks shown in the evidence. For this 11-week period, claimant's average weekly wage was $444.59 and this was 90 percent of the preinjury wage. The statute does not give specific direction on how to calculate the post-injury wage or what period should be used. But the Board considers it most appropriate to adhere, to the extent possible, to the same method used to calculate the average weekly wage at the time of the injury. The formulas for that calculation, found in K.S.A. 44-511, use a 26-week period to calculate an average weekly wage for an hourly employee. In this case, using the most recent 26 weeks, the week ending September 26, 1997, through the week ending March 20, 1998, shows an average weekly wage of $404.70, approximately 18 percent less than the wage at the time of the injury. The Board, therefore, concludes claimant's average weekly wage is now less than 90 percent of her preinjury wage. Claimant's current wage would not, therefore, preclude work disability.

The Board, nevertheless, agrees with the ALJ that the Award should not be modified. Intrinsic to the Act is a requirement that there be some type of causal connection or nexus between the injury and the disability for which the benefits are being awarded.

The injury must arise out of the employment.[1] In the case of work disability this requires, in our view, a nexus between the injury and both the task loss and the wage loss. K.S.A. 44-510e. In the case of the task loss, the causation requirement is obvious. The task loss factor is based on loss of ability resulting from the injury. In the case of wage loss, the causation requirement is less explicit. The express language of K.S.A. 44-510e requires only a calculation of the percentage difference between the wage at the time of the injury and the wage after the injury. On its face, the language of the statute suggests the reason for the change in pay is irrelevant. Nevertheless, the Board believes the fundamental function and purpose of the Act expects that there be a nexus between the injury and the wage loss before that loss can be a factor used to calculate the amount of benefits.

When the claimant changes jobs, or changes to a lower-paying accommodated employment because of the injury, other factors may also influence the new wage, but the injury is a cause of the wage change. In such cases the Board has consistently used the actual wage so long as the claimant has made a good faith effort to obtain and retain employment.[2] The Board has not required the claimant to show what portion of the change in wages is due to the injury and what is due to other factors. It is enough that the wage change would not have occurred but for the injury. Even later changes in that wage, up or down, have some casual connection to the injury through the initial job change.

The same is not true if the claimant remains able to, and does continue to, do the job he/she did at the time of the injury. Later changes in the wage resulting from changes in the employer's practices or other factors may not be in any way caused by the injury. The wage change would have occurred regardless of the injury. The Act was not intended as a wage guarantee. For this reason, the Board concludes that when the claimant is able to return to the same job and wage he/she had at the time of the injury, a subsequent change in pay which reduces the pay to less than 90 percent should not automatically trigger work disability. It should not unless the change is shown to be the result of the injury. To do otherwise, in our view, violates the fundamental requirement that the disability be caused by the injury.

In this case, the Board has reviewed the record and concludes claimant returned to, and was able to do, the same job after the injury without accommodation. Claimant has not shown that the reason she now earns less than 90 percent of her preinjury wage is because of the injury. Claimant asserts that she worked slower but also acknowledges the change in the incentive pay system. Claimant's supervisor testified that the change in the incentive system and reduction in overtime produced the lower pay, not slower work by the claimant. She testified that, in fact, claimant did not work slower. The Board finds the

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[1] Craig v. Electrolux Corporation, 212 Kan. 75, 510 P.2d 138 (1973).

[2] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140, *rev. denied* 275 Kan. 1091 (1995); Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

reason claimant earns less than 90 percent of the preinjury wage is because of the change in the incentive system and reduced overtime, neither of which occurred because of claimant's injury or because claimant worked slower. Even if we assume claimant worked slower because of her injury, and that doing so is part of the reason she earned less incentive pay, the evidence does not establish that the change in pay due to working slower, if any, would have dropped the wage to less than 90 percent of the preinjury wage. Claimant, therefore, has not proven a nexus between the injury to the fact she now earns less than 90 percent of the preinjury average weekly wage. In our view, she is not entitled to a work disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark on May 22, 1998, should be, and the same is hereby affirmed.

IT IS SO ORDERED.

Dated this ____ day of March 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

Ms. Lawless developed bilateral carpal tunnel syndrome while working on Emerson's line. After surgeries on both wrists, she returned to the same work with limitations. She now feels discomfort in her arms when working and is unable to work as fast as she could before the injuries. Because of her slower work pace, coupled with reductions in overtime and changes in the incentive pay system, Ms. Lawless now earns less than 90 percent of the pre-injury average weekly wage.

It is not clear from the majority's opinion whether its decision relies upon a finding that claimant was returned to work at the same job with the same employer without restrictions. It is true that Dr. Patel did not issue any specific restrictions when he released

claimant to return to work. But he told her that she would continue to have problems as long as she continued to do the same type of work. He recommended claimant quit if she could not tolerate it. In effect, Dr. Patel was advising claimant to self-limit her work activities rather than imposing specific restrictions. Nevertheless, claimant returned to work with respondent doing the same type of work that had caused her repetitive use injuries. As a result of pain and discomfort, claimant performed her work slower.

Dr. Blaty recommended claimant avoid repetitive gripping, squeezing, twisting, or turning activities with her hands for more than two hours a day or more than 30 minutes at a time. He also restricted lifting over 30 pounds occasionally and 15 pounds frequently. These restrictions were to prevent aggravating claimant's preexisting problems that had resulted from her work for respondent. As Dr. Blaty's testimony points out, it is unrealistic to return an injured worker to the same repetitive tasks job that caused the repetitive use injury and not expect additional problems.

We would find that claimant had restrictions on her tasks performing abilities that prevented her from doing all of the tasks she was performing at her job for respondent at the time of her injuries. Once this has been established then whether or not claimant's subsequent wage loss occurred as a result of her injuries is not meaningful to a determination of work disability.

The permanent partial general disability rating is computed by averaging the tasks loss percentage with the percentage difference in actual pre- and post-injury wages. If the functional impairment rating is higher than that average, the functional impairment rating then becomes the permanent partial general disability percentage. Also, while a worker **is earning** at least 90 percent of the pre-injury average weekly wage, the permanent partial general disability rating is limited to the functional impairment.

The Workers Compensation Act provides:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker **is earning** after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee **is engaging** in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)[3]

[3] K.S.A. 44-510e.

But that statute, however, must be read in light of Foulk[4] and Copeland.[5] In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that paid a comparable wage that the employer had offered. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wage should be based upon ability rather than actual wages when the worker fails to put forth a good faith effort to find appropriate employment after recuperating from the injury.

When Foulk or Copeland apply, a post-injury wage is imputed for the wage loss prong of the permanent partial general disability formula. But here, there is no allegation or argument that either Foulk or Copeland applies.

Despite the specific finding that Ms. Lawless now earns less than 90 percent of her pre-injury average weekly wage, the majority has rejected the request to modify the original Award. Due to the decrease in wages, there has been a material change in circumstances.

In effect, the majority is applying an ability test rather than an actual wage loss test for the wage loss prong of the permanent partial disability formula. Stripping the majority decision to its very basis, the majority finds that Ms. Lawless retains the ability to earn a wage that is at least 90 percent of the pre-injury wage but she is not doing so for reasons other than the injury. Therefore, the majority holds that her benefits should be limited to the functional impairment rating. The problem with that analysis is that it does not follow the statutory formula quoted above.

Before 1993, permanent partial general disability was determined by considering both the loss of the ability to perform work in the open labor market and the loss of ability to earn a comparable wage.[6] Although there is a trend to use an ability test instead of actual wage loss in the wage loss prong of the current version of K.S.A 44-510e, that trend has been limited to circumstances where a worker has failed to exercise good faith in attempting to find employment[7] or where a worker is capable of earning 90 percent of the pre-injury average weekly wage but chose not to do so.[8]

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[4] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140, *rev. denied* 257 Kan. 1091 (1995).

[5] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[6] K.S.A. 1987 Supp. 44-510e.

[7] Copeland, *supra*; Cooper v. Mid-America Dairymen, 25 Kan. App. 2d 78, 957 P.2d 1120, *rev. denied* __ Kan. __ (1998).

[8] Lowmaster v. Modine Manufacturing Co., 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* _ Kan. _ (1998).

The majority seems to acknowledge claimant's limitations have caused her to work slower yet finds she has failed to prove that all of her wage loss is due to her injuries. This requirement has now opened a door that will increase litigation. Despite the clear language of the statute, this case will be precedent that the actual wage difference in pre- and post-injury earnings is no longer appropriate to determine permanent partial general disability when there is any factor other than the injury that attributes to the actual wage loss. To be consistent, the majority must equally apply this same standard to both initial awards and review and modification proceedings. Therefore, injured workers should now be prepared to present evidence as to what portion of their actual wage loss is solely related to their injury and what portion is related to other factors. Likewise, applying the logic of this decision, employers should introduce evidence that actual wage loss has been affected by such factors as a limited labor market, unfavorable economic conditions, the worker's limited education and various other factors not yet imagined. Although some may argue that this approach is fair and just, it is extremely difficult to apply and is contrary to the law as drafted by the legislature.

The majority has erred. Ms. Lawless has lost some ability to work as a result of the bilateral carpal tunnel syndrome. Until such time as the appellate courts apply another exception to the permanent partial general disability formula, unless a worker has failed to make a good faith effort to find appropriate employment, permanent partial general disability is determined by comparing actual pre-injury and post-injury wages.

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BOARD MEMBER

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BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
Edward D. Heath, Jr., Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director